Supreme Court, U.S.
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No. 03-598

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

ANDERSON GARRON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

JOSEPH A. LEVIN
LEVANT, MARTIN & LEVIN, P.C.
Attorneys for Respondent
3201 Atlantic Avenue
Atlantic City, NJ 08401
(609) 345-9005

184895

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

Respondent Anderson Garron respectfully submits that the petition for a writ of *certiorari* should be denied for the following reasons. Firstly, the New Jersey Supreme Court's ruling essentially addressed the misapplication of a state statute by a state trial court. Put simply, the New Jersey Supreme Court ruled that the trial court misapplied the New Jersey Rape Shield Statute and, in so doing, kept from the jury highly relevant evidence, evidence that was necessary for a fair determination of the trial issues. As such, the petition for a writ of *certiorari* should be denied pursuant to Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the principle that "a petition is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Secondly, the New Jersey Supreme Court's ruling that "if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled," is in complete accordance with state and federal constitutional jurisprudence. Pet., App. at 22a – 23a. Thus, the New Jersey Supreme Court properly reformulated the New Jersey Rape Shield Statute to ensure that it did not violate defendant's right to confront witnesses against him, right to compulsory process, and right to a fair trial. Since the ruling does not conflict with relevant decisions of this Court (or other state or federal courts for that matter), there is no valid reason to grant the petition for a writ of *certiorari* under Supreme Court Rule 10(c).

Lastly, the New Jersey Supreme Court's decision does not have any far-reaching implications. The Court's decision did not strike down the Rape Shield Statute, but rather struck a balance between "defendant's right to confrontation and to the compulsory process of witnesses, and the victim's right to be free from an unnecessary invasion of her privacy." Pet., App. at 2a. Moreover, the Court's decision does not conflict with the decisions of any state or federal courts. Furthermore, the Court's decision cannot even be characterized as far-reaching in New Jersey, as the Court expressly

stated that the decision was "limited to its unique facts." Pet., App. at 28a. Accordingly, the writ should be denied due to the lack of far-reaching, national implications.

In actuality, the petition for a writ of *certiorari* represents a thinly-veiled piece of victim's rights propaganda, pandering to the victim's rights movement at the expense of legitimate constitutional concerns. The petition couches the ruling of the New Jersey Supreme Court as "emblematic of a national phenomenon demanding global action only this Court can take." Pet. at 7. Yet, Petitioner cites no federal or state court decisions striking down Rape Shield Statutes at the expense of putative rape victims. To the contrary, the law cited by Petitioner is inapposite and addresses areas with categorical preclusions of evidence, such as scientific polygraph evidence, that have no applicability here. The fact of the matter is that the New Jersey Supreme Court's decision in *State v. Garron*, 177 N.J. 147, 827 A.2d 243 (2003) was sound in all respects and does not require further review.

. . .

A Cumberland County Grand Jury indicted Respondent Anderson Garron for first-degree aggravated sexual assault pursuant to N.J. Stat. Ann. 2C:14 – 2a(4), third-degree aggravated sexual contact pursuant to N.J. Stat. Ann. 2C:14 – 3a, and second-degree official misconduct pursuant to N.J. Stat. Ann. 2C:30 – 2a, arising out of a sexual encounter between Respondent Anderson Garron, a Bridgeton Police Officer, and J.S., a former secretary at the Cumberland County Prosecutor's Office. From the inception of the case, the "precise nature of that encounter was sharply contested by J.S." and Respondent. Pet., App. at 2a. J.S. contended that she was forcibly raped during the encounter. Conversely, Respondent Anderson Garron steadfastly maintained his innocence and repeatedly, consistently and emphatically asserted that any sexual relations that had occurred during the encounter were consensual.

In support of his consent defense, Respondent Anderson Garron "sought to introduce testimony concerning J.S.'s conduct toward him in the years leading up to what he claims was a voluntary sexual

encounter." Pet., App. at 3a. Specifically, Respondent sought to introduce testimony that would demonstrate that there was a continuing course of conduct between J.S. and Respondent, which led Respondent to reasonably believe that J.S. freely and affirmatively consented to the sexual activity of which she complained. *See* N.J. Stat. Ann. 2C:14 – 7d. Respondent sought to introduce this crucial testimony under New Jersey's Rape Shield Statute, which provides in pertinent part:

> a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, . . . evidence of the victim's previous sexual conduct shall not be admitted or a reference made to it in the presence of the jury except as provided in this section. . . . *If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material and meets the requirements of subsections c and d of this section and that the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under order of the court.*
>
> *b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.*
>
> . . .

> *d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.*

N.J. Stat. Ann. 2C:14-7(a), (b), (d) [emphasis added].

Pursuant to the dictates of the Rape Shield Statute, the trial court held a pretrial hearing to determine the admissibility of the proffered evidence regarding the past relationship between J.S. and Respondent. At the hearing, Respondent presented five witnesses. Respondent Anderson Garron testified that J.S. would kiss him, hug him, brush-up against him, flirt with him, and grab his buttocks. Further, Respondent Garron testified that J.S. made a multitude of comments indicating a strong desire to freely and to voluntarily engage in consensual sexual relations with him. The comments included, "are you ready to have an affair." *See* Pet., App. at 3a – 5a.

Respondent's wife, Stephanie Garron, who was a detective at the Cumberland County Prosecutor's Office, testified and corroborated Respondent's testimony. She testified that J.S. would kiss, hug, brush-up against, and touch Respondent, as well as grab Respondent's hand and attempt to pull him away. Moreover, Mrs. Garron testified that J.S. made a number of comments indicating a strong desire to engage in consensual sexual relations with Respondent, including "I'll take that man away from you if he spends just one night with me," "Is that your gun or are you happy to see me," and other blatant remarks about having an affair with Respondent. *See* Pet., App. at 5a – 6a.

Wendy Frost, a secretary in the Cumberland County Prosecutor's Office provided testimony that corroborated the Garrons' account with respect to the inappropriate touching of Respondent by J.S., as well as the inappropriate comments. Ms. Frost even indicated that J.S. stated that she was going to take Respondent away from his wife. *See* Pet., App. at 6a – 7a. Similarly,

Terri Seay, another secretary at the Cumberland County Prosecutor's Office, testified in a manner that corroborated the Garrons' testimony and that provided further evidence of a course of conduct indicating a strong desire to freely and voluntarily to engage in consensual sexual relations with him. *See* Pet., App. at 7a. Thus, in summary, all of the witnesses consistently testified that J.S. had engaged in a course of sexual conduct with Respondent. *See* Pet., App. at 3a – 8a.

In a written opinion, the trial court held that Respondent had offered clear and convincing proof that overcame the presumption against the admission of sexual conduct of the victim more than one year prior to the alleged incident. *See* Pet., App. at 120a.

> *The defendant has offered clear and convincing proof of prior sexual conduct that overcomes the presumption against the admission [of] sexual conduct of the victim more than one year prior to the alleged incident. The Court agrees with the defendant's position that although the three incidents of sexual conduct occurred prior to the one year limitation, the evidence the defendant intends to offer shows a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant. In the Court's opinion, the defendant has overcome the presumption.*

Ibid. [emphasis added].

After so holding, despite the fact that the Court found clear and convincing evidence and found that such evidence showed a continuing course of conduct, the trial court inexplicably parsed the conduct and only permitted the admission of three, isolated, unrelated "instances of sexual conduct." *See* Pet., App. at 119a – 121a. The trial court admitted evidence that J.S. had grabbed Respondent's buttocks in 1995 or 1996, that J.S. had kissed Respondent passionately in March of 1997, and that J.S. had kissed Respondent passionately on another occasion in 1998, after he had resolved an

outstanding bench warrant for her. The trial court found that these three, isolated, unrelated incidents were admissible under N.J. Stat. Ann. 2C:14 – 7d in that they showed that J.S. consented to the sexual conduct by demonstrating "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the [Respondent]." Even though the trial court admitted these three, isolated, unrelated instances of conduct, their admission was totally out-of-context and did not illustrate the "course of conduct" that the trial court had found by clear and convincing evidence.

Although the remaining testimony directly impacted on the central issue in the case, consent, the trial court excluded both the evidence of sexual conduct and the evidence of statements made by J.S. indicating her consent. The trial court inexplicably concluded that the remainder of the conduct was "flirtatious" as opposed to sexual conduct and was not probative of whether J.S. consented to the sexual activity. As a result of the trial court's ruling, Wendy Frost and Terri Seay were barred from testifying at trial with respect to the course of sexual conduct and with respect to the statements made by J.S., statements which clearly gave rise to the reasonable inference that J.S. freely and affirmatively permitted the sexual activity. Additionally, the trial court severely limited the testimony of Respondent Anderson Garron and Respondent's wife.

At trial, J.S. testified that Respondent forced her to engage in oral sex. With respect to prior sexual conduct with Respondent, J.S. testified that she never kissed Respondent in a passionate manner, that she never touched Respondent's buttocks, and that she never touched Respondent anywhere on his body. Respondent attempted to rebut this testimony through his testimony and that of his wife, however, was not permitted to call any of the neutral, objective witnesses (e.g., Wendy Frost and Terri Seay) that could corroborate his account of the kissing and touching.

Furthermore, at trial, Respondent testified that he was innocent and that all sexual activity between J.S. and him was consensual. The entire case came down to a credibility determination, whereby

the jury had to choose to believe either Respondent or J.S. The trial court's ruling that Respondent Garron had proven, by clear and convincing evidence, a continuing course of conduct on the part of J.S. to engage in sexual conduct with Respondent could not co-exist with its subsequent exclusion of almost the entirety of the conduct. As stated, the end result was that J.S. was permitted to tell her story, while Respondent was severely restricted. Instead of being able to apprise the jury as to the reason that he believed J.S. freely and affirmatively consented and to testify to this continuing course of sexual conduct, he was forced to testify to isolated, unrelated incidents that did not present a full picture. In fact, in isolation, the incidents made little sense. As such, the jury made the necessary credibility determination without truly hearing Respondent's version of historical events.

Having received an inaccurate and incomplete picture of events leading up to the September 28, 1998 sexual encounter, not surprisingly, the jury convicted Respondent as to all counts. In turn, the trial court rendered imposition of sentence. On count one, aggravated sexual assault, Respondent was sentenced to 11 years in the New Jersey State Prison with a three and two-thirds year period of parole ineligibility pursuant to the Graves Act, codified under N.J. Stat. Ann. 2C:43 – 6(c). On count two, aggravated sexual contact, Respondent was sentenced to three years in the New Jersey State Prison with a one-year period of parole ineligibility under the Graves Act. On count three, official misconduct, Respondent was sentenced to six years in the New Jersey State Prison. Although the counts did not merge, the sentences on all three counts were to run concurrently. In addition, the trial court applied the No Early Release Act pursuant to N.J. Stat. Ann. 2C:43 – 7.2 and imposed the requisite 85% period of parole ineligibility and a five-year period of parole supervision. Finally, the trial court indicated that Respondent's convictions for aggravated sexual assault and aggravated sexual contact subjected him to Megan's Law reporting requirements under N.J. Stat. Ann. 2C:7 – 1, *et seq*.

After sentencing, Respondent immediately filed an appeal, challenging, among other things, the trial court's ruling under the Rape Shield Law. Petitioner, State of New Jersey, failed to file a cross-appeal and did not challenge the trial court's initial piercing of the Rape Shield Statute. Thus, presumably, Petitioner conceded that the trial court properly pierced the Rape Shield Statute. The issue in the Superior Court of New Jersey, Appellate Division, therefore, was whether the trial court properly applied the Rape Shield Statute.

In an unpublished opinion, the majority of the Appellate Division (*Per Curiam*) affirmed the judgment of conviction in all respects and found that the trial court properly had applied the Rape Shield Statute. In a dissent, Judge Wecker found that the trial court had committed reversible error in excluding under the Rape Shield Statute, N.J. Stat. Ann. 2C:14 – 7, highly relevant evidence that went to the heart of the consent defense. *See* Pet., App. at 103a – 105a. In particular, Judge Wecker presciently stated:

> *The jury heard about three incidents of physical contact which the judge deemed relevant, but the jury never heard substantial available evidence from several witnesses of J.S.'s explicit verbal invitations to defendant. And the jury heard only a fraction of the available evidence from several witnesses of J.S.'s expressed desires with respect to him, that coming from Mrs. Garron and not from two independent witnesses. The entirety of J.S.'s remarks, if known to and believed by the jury had the potential for creating reasonable doubt in the mind of at least one juror. To artificially distinguish past encounters between the defendant and J.S. on the ground that some were "merely flirtatious" reflects a failure to appreciate the legitimate and compelling purpose for which the evidence was offered.*

See Pet., App. at 104a [emphasis added]. Based upon the dissent, Respondent appealed to the Supreme Court of New Jersey as a

matter of right under R. 2:2 – 1(a)(2). The issue, again, was the application of the New Jersey Rape Shield Statute by the trial court.

The New Jersey Supreme Court expressly stated that the issue was whether the trial court properly applied the Rape Shield Statute. After so stating, the State Supreme Court applied the state statute and determined that the trial court had erred in its exclusion of the necessary, crucial, relevant evidence pertaining to consent. Thereafter, the New Jersey Supreme Court went on to reformulate the New Jersey Rape Shield Statute in accordance with state and federal constitutional precedent and to apply the reformulated statute to the same effect.

REASONS FOR DENYING THE PETITION

I. THE WRIT SHOULD BE DENIED, AS THE NEW JERSEY SUPREME COURT'S RULING PRIMARILY DETERMINED THAT THE TRIAL COURT *MISAPPLIED* THE NEW JERSEY RAPE SHIELD LAW AND, IN SO DOING, KEPT FROM THE JURY HIGHLY RELEVANT EVIDENCE THAT WAS NECESSARY FOR A FAIR DETERMINATION OF THE CASE.

From the outset, the New Jersey Supreme Court framed the issue before the Court as an issue of application:

> *We must determine whether the trial court properly applied the Rape Shield Statute, N.J. Stat. Ann. 2C:14 – 7, in excluding evidence of the victim's past relationship with defendant.* Defendant claims that the excluded evidence would have explained the events leading to the sexual encounter and to the victim's consent and, therefore, was critical to a fair trial. The State claims that the victim's prior conduct did not possess sufficient probative value on the ultimate issue before the jury, whether the defendant forced the victim to perform a sexual act against her will. In these competing arguments are found the tension between

> defendant's right to confrontation and compulsory process of witnesses, and the victim's right to be free from an unnecessary invasion of privacy. *We conclude that the trial court misapplied the Rape Shield Statute in keeping from the jury* ***highly*** *relevant evidence that was necessary for a fair determination of the case and, therefore, reverse and remand for a new trial.*

1a – 2a [emphasis added]. In essence, the New Jersey Supreme Court ruled that the trial court misapplied the New Jersey Rape Shield Statute and, in so doing, kept from the jury highly relevant evidence, evidence that was necessary for a fair determination of the trial issues. Therefore, the New Jersey Supreme Court's ruling at its heart involves the *misapplication* of a state statute by a state trial court.

In applying the Rape Shield Statute to the facts, the Supreme Court stated:

> One view is that she engaged in office buffoonery, bawdy humor, and innocent but self-indulgent attention seeking. Another view is that she aggressively pursued defendant using humor as a thinly-veiled cover for her sexual advances. The jury was particularly well suited to divine the true meaning of the language and conduct of J.S. . . . In this case, "[t]he role of the factfinder [was] to decide . . . whether . . . defendant's belief that the alleged victim had given affirmative permission was reasonable." *State in the Interest of M.T.S.*, 129 N.J. 422, 448 (1992). *Defendant's state of mind was directly at issue. How defendant's prior relationship with J.S. affected his state of mind was critical to the ultimate determination of the jury.*
>
> *The trial judge permitted only fragmented pieces of evidence to be presented to the jury concerning J.S.'s relationship with defendant. The judicial censorship did more than distort the true picture of events*

leading to the sexual encounter, it made it less likely that the jury would believe any part of the defense of consent. The trial court allowed testimony by the defendant concerning J.S.'s two passionate kisses and her grabbing his derriere. However, J.S. denied that those events ever occurred. Therefore, the truth regarding those incidents and the sexual encounter was reduced to a credibility contest between just two people. Without the testimony of independent witnesses from the Cumberland County Prosecutor's Office who were able to give examples of J.S.'s public shows of affection toward defendant, it was less likely that the jury would believe that J.S. passionately kissed defendant and grabbed his buttocks, and that in turn made it less likely that the jury would find believable defendant's consent defense. Had J.S. contradicted Frost and Seay's testimony describing J.S.'s physical advances toward defendant, as well as her sexually alluring remarks, the case would not have boiled down to a "he said-she said" dispute. *The credibility determination between J.S. and defendant may well have hinged on the presentation of seemingly disinterested witnesses whose testimony had no partisan flavor, testimony that would have buttressed defendant's assertions. Each piece of evidence delicately supported another in the presentation of the consent defense, and the removal of key pieces of evidence presaged the total collapse of that defense. Applying another metaphor, the jury was given a book with missing chapters.*

. . .

In this case, the information withheld from the jury did not concern the victim's intimate relations with persons other than this defendant. The withheld evidence did not paint the victim as a woman with a sordid past, making her allegations unworthy of belief. The withheld

evidence, however, did shed light on the victim's relationship with defendant. However, unflattering or embarrassing the details, the evidence was offered for a legitimate objective, to support defendant's consent defense. The story left untold by defendant was of a woman infatuated with him and who pursued him aggressively, even in the presence of her fellow office workers and his wife. The defendant needed to explain why he was at the victim's house in the early morning of September 28, why he followed her into the laundry room of her home, and why he reasonably believed she consented to have sexual relations with him. *The untidy details of defendant's relationship with J.S. were essential to understanding his side of the story. Selectively editing those details, as the trial court did here, did not advance the truth-seeking function of the trial.*

. . .

The verbal and physical conduct, both sexual and flirtatious, was, for the most part, inextricably intertwined in a course of conduct over a six-year period.

. . .

The trial judge found at the Rape Shield hearing that defendant had presented clear and convincing proof of "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant." However, by excluding the vast majority of that evidence, the jury had no inkling of the course of conduct and was left to evaluate the conflicting versions of the incident in question within the confines of the contested buttocks-grabbing and two passionate kisses, each of which occurred more than one year apart and appeared to be wholly unrelated to each other and to the incident in question. The excluded evidence of J.S.'s conduct was relevant

> *and necessary for a fair determination of the witnesses' relative credibility and on the ultimate issue of consent. We therefore conclude that the exclusion of the evidence was "clearly capable of producing an unjust result," R. 2:10-2, and reverse and remand for a new trial.*

Pet., App. at 24a – 25a, 27a, 28a, 30a [emphasis added].

Unquestionably, the crux of the New Jersey Supreme Court's ruling involved the application of the New Jersey Rape Shield Statute. As Petitioner notes, the New Jersey Supreme Court "reformulated" the New Jersey Rape Shield Statute in a manner consistent with the pre-1994 amendment. Prior to the 1994 amendment, the Rape Shield Statute required that the evidence be "relevant" and that the evidence's probative value not be "outweighed" by its collateral nature, confusion of the issues or an unwarranted invasion of the victim's privacy. The 1994 amendment required that the evidence be "relevant and highly material" and that the evidence's probative value "substantially outweigh" the above-listed collateral-confusion-privacy concerns. Thus, the difference between the two versions of the Rape Shield Statute comes down to the modifiers "highly" and "substantially."

However, Petitioner fails to recognize that the New Jersey Supreme Court applied both the pre- and post-1994 amendment versions of the statute. For example, in the beginning of its opinion, the Court concluded that the trial court "misapplied the Rape Shield in keeping from the jury *highly* relevant evidence that was necessary for a fair determination of the case." Pet. at 1a – 2a. Subsequently, the Court dispensed with the modifier "highly" and simply found that the trial court improperly excluded evidence of J.S.'s conduct that "was relevant and necessary for a fair determination of the witnesses' credibility on the ultimate issue of consent." Pet. at 30a. Under the application of either version of the Rape Shield Statute, regardless of the modifiers utilized by the New Jersey Supreme Court, the application was the same – the New Jersey Supreme Court ruled that the trial court's erroneous exclusion of highly

relevant (or merely relevant) evidence that was necessary for a fair trial mandated reversal of the judgment of conviction and remand for a new trial. There is no reason to grant the writ if the result remains the same under either version of the statute. Furthermore, there is no reason to grant the petition for a writ of *certiorari* when the New Jersey Supreme Court's ruling, at its essence, addressed the *misapplication* of a state statute by a state trial court.

Based upon the foregoing, the petition for a writ of *certiorari* should be denied pursuant to Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the principle that "a petition is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Additionally, the petition for a writ of *certiorari* should be denied for lack of jurisdiction pursuant to 28 U.S.C. § 1257(a), as the application of the state statute is the primary issue addressed below.

II. THE WRIT SHOULD BE DENIED, AS THE NEW JERSEY SUPREME COURT PROPERLY REFORMULATED THE NEW JERSEY RAPE SHIELD STATUTE TO ENSURE THAT IT DID NOT VIOLATE RESPONDENT'S RIGHT TO CONFRONT WITNESSES, RIGHT TO COMPULSORY PROCESS AND RIGHT TO A FAIR TRIAL.

In New Jersey, whenever a defendant asserts that the exclusion of evidence under the Rape Shield Law violates his state and federal constitutional rights, such as the right to confrontation, to cross-examination, to compulsory process, to a fair trial, and so forth, the exclusion of such evidence must be closely scrutinized. *State v. Budis*, 125 N.J. 519 (1991) (citing *Chambers v. Mississippi*, *infra*, 410 U.S. at 295). In so doing, the New Jersey Supreme Court consistently has held that a two-step analysis must be employed:

> *First, we must ascertain, apart from the rape shield statute, whether the evidence was relevant*

> *to the defense. If the evidence is relevant, we then must decide whether its probative value outweighs its prejudicial effect. If so, the evidence may not constitutionally be excluded.*

State v. Budis, 125 N.J. at 532 [emphasis added]; *see also State v. Cuni*, 159 N.J. 584, 600 (1999).

The New Jersey Supreme Court employed this two-step analysis in *State v. Budis*, 125 N.J. at 527. In this aggravated sexual assault case involving a minor victim, the defendant moved to introduce details of prior sexual abuse committed by the victim's step-father. The trial court barred the introduction of such evidence under the Rape Shield Statute and significantly restricted defendant's cross-examination of the victim and the assigned-detective. *Id.* at 532. On appeal, the New Jersey Supreme Court found that the prior abuse was relevant for two reasons.

> First, it rebuts that inference that T.D. acquired the knowledge to describe the sexual matters from her experience with defendant. Second, the evidence is relevant to show that T.D. had the knowledge to initiate the sexual acts as described by defendant.

Id. at 534. Additionally, the Court determined that there was no undue prejudice in admitting the evidence.

> We are sensitive to the possibility that evidence of T.D.'s prior abuse may invade her privacy and cause her anxiety or embarrassment. On balance, we believe that these factors do not outweigh the significant probative value of the evidence.

Id. at 540. The New Jersey Supreme Court held that the evidence of past abuse should have been admitted and that its non-admission constituted reversible error. *Id.* at 541.

The ruling in *Budis*, *supra*, stands for the proposition that "neither statutes nor evidence rules may bar defendant from using evidence and material relevant to his defense where the bar would violate the

constitutional right to confront and cross-examine witnesses." Cannel, *New Jersey Criminal Code Annotated*, comment 4 on N.J. Stat. Ann. 2C:14 – 7d (Gann 2003). As a result of the proposition, "the list of particular subjects in the [Rape Shield Statute] is treated as illustrative rather than exhaustive." The New Jersey Courts have not hesitated to admit evidence not particularly set forth in the statute in order to protect defendants' constitutional rights, including the right to confront and cross-examine witnesses. *See, e.g., State v. Bray*, 356 N.J. Super. 485, 494 – 96 (App. Div. 2003) (recognizing that the Confrontation Clause requires the admission of prior sexual abuse of a child victim to demonstrate an alternate source of sexual knowledge); *State v. G.S.*, 278 N.J. Super. 151, 169 (App. Div. 1994), *rev'd on other grounds*, 145 N.J. 460 (1996) (finding that barring a witness from testifying as to facts in the indictment would be improper); *State v. W.L.*, 278 N.J. Super. 295 (App. Div. 1995) (permitting use of diaries of child-victim to support theory that another sexually abused victim); *State v. Ross*, 249 N.J. Super. 246 (App. Div. 1991) (permitting testimony about prior sexual abuse, for precluding such an inquiry would deny defendant his right to cross-examination); *State v. Ogburne*, 235 N.J. Super. 113, 117 (App. Div. 1989) (permitting inquiry with respect to possible source of pubic hair found on bedclothes).

In sum, New Jersey Courts have long adhered to the proposition that, if the evidence is relevant and necessary to a fair determination of the issues, then the admission of such evidence is constitutionally compelled. *See* Pet., App. at 22a. New Jersey's approach is in complete accordance with this Court's jurisprudence.

Both the New Jersey and United States Constitutions guarantee defendants "a meaningful opportunity to present a complete defense." Pet., App. at 19a (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636, 645 (1986)). The opportunity to present a

complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant's claim of innocence." Pet., App. at 19a (quoting *Crane v. Kentucky*, 476 U.S. at 690, 106 S. Ct. at 2147, 90 L. Ed. 2d at 645).

The Sixth Amendment of the United States Constitution, and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const., Amends. VI & XIV; N.J. Const., Art. I, Para. 10; *See also Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

> Confrontation means more than being allowed to confront the witness physically. 'Our case is construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama*, 380 U.S. 415, 418(1965).
>
> . . .
>
> [Cross-examination] is the principal means by which the believability of a witness and truth of his testimony is tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing the possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand . . . We have recognized that the exposure of a witness' motivation in testifying is an important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

Thus, an accused's constitutionally protected right to confront and cross-examine witnesses against him is "more than a desirable rule of trial procedure." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

> [Cross-examination] is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' [I]ts denial or significant diminution calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined.

Id. [Citations omitted].

In addition to an accused's fundamental right to confront and cross-examine witnesses against him, it is axiomatic that an accused may also present a defense and call witnesses on his own behalf. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967). In fact,

> few rights are more fundamental than that of an accused to present witnesses in his own defense.

Chambers v. Mississippi, 410 U.S. at 303.

It was in this light that the New Jersey Supreme Court scrutinized the constitutionality of the 1994 amendment to the Rape Shield Statute. As stated, the New Jersey Rape Shield Statute was amended in 1994 "to strike an appropriate balance between protecting a defendant's constitutional rights and protecting a rape victim from an assault upon the victim's character." Pet., App. at 18a. Prior to the amendment, the statute required that the evidence be

> *Relevant and that the probative value of the evidence offered is not outweighed* by its collateral nature or by the probability that its admission will

> create undue prejudice, confusion of the issues, or unwarranted invasion of privacy of the victim.
>
> And material to negating the element of force or coercion.

Pet., App. at 18a (citing N.J. Stat. Ann. 2C:14 – 7a & c (1988) [emphasis added]). The amended Rape Shield Statute required that the evidence be

> *Relevant and highly material and meet [ ] the requirements of subsection . . . d . . . and that the probative value of the evidence offered substantially outweigh* [ ] its collateral nature..

Pet., App. at 18a (citing N.J. Stat. Ann. 2C:14 – 7a (1994) [emphasis added]). The New Jersey Supreme Court stated:

> An unconstrained reading of the Statute leads to the exclusion of prior sexual conduct unless it is highly material and its probative value substantially outweighs its prejudicial effect. . . . Accordingly, evidence of prior sexual conduct that is only material (not highly material) and that has probative value outweighing (not substantially outweighing) its prejudicial impact would not be admissible at trial. *That formulation would keep from the jury evidence that is admissible under the Confrontation and Compulsory Process Clauses, and the constitutional standards enunciated in Budis. We must construe the statute so that its reach does not exceed its constitutional limits. We reaffirm the test advanced in Budis that evidence relevant to the defense that has probative value outweighing its prejudicial effect must be placed before the trier of fact. We do not read the Shield Statute in a way that would deny a defendant a fair trial. In summary, evidence that is relevant and necessary to prove the defense of consent is not excluded under the Shield Statute.*
>
> . . .

> *Stated in a different way, if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled.*

Pet., App. at 22a – 24a.

Thus, the New Jersey Supreme Court properly reformulated the New Jersey Rape Shield Statute to ensure that the it did not violate Respondent's right to confront witnesses against him, right to compulsory process, and right to a fair trial. The Court's ruling – that "if the evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled" – remains completely consistent with state and federal jurisprudence. Pet., App. at 22a.

Petitioner argues that the Supreme Court of New Jersey failed to apply the analysis set forth in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), wherein this Court stated:

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.*

Id. at 308.

It is not the Supreme Court of New Jersey that fails in its application, but rather Petitioner who fails to recognize that the Court did apply the analysis. The New Jersey Supreme Court acknowledged that constitutional rights "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Pet., App. at 20a. However, the Court went on to state that, "when the mechanistic application of a state's rules of evidence or procedure would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses, the Confrontation and Compulsory Process Clauses must prevail." *Ibid.* The Court properly found that exclusion of the evidence infringed upon the weighty constitutional interests of the accused to confront witnesses against him, to compulsory process, to present a defense, to a fair trial, and so on. It cannot be more clear than the Court's finding that the exclusion of the evidence compromised defendant's ability to defend against the charges. Pet., App. at 20a.

In fact, when viewed in context, *United States v. Scheffer*, *supra*, actually supports the ruling of the New Jersey Supreme Court. In *Scheffer*, This Court addressed the question of whether Military Rule of Evidence, 707, which categorically precluded polygraph evidence in court-martial proceedings, unconstitutionally abridged the right of the accused members of the military to present a defense. This Court held that the categorical preclusion of the evidence was constitutional, because the evidence was unreliable, because the exclusion of the evidence preserved the fact-finder's core function of making credibility determinations, and because the exclusion of the evidence avoided litigation over issues other than guilt or innocence.

In *Scheffer*, in holding that the exclusion of the polygraph evidence was constitutionally permissible, this Court rejected the applicability of *Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi*. In *Rock v. Arkansas*, 483 U.S. 44, 52, 62, 107 S. Ct. 2704, 2709, 2714, 97 L. Ed. 2d 37, 46,

52 – 53 (1987), this Court held that the exclusion of hypnotically-refreshed testimony that was material and favorable to the accused, tending to show that the gun accidentally discharged, violated defendant's right to compulsory process. In *Washington v. Texas*, 388 U.S. 14, 16, 23, 87 S. Ct. 1920, 1921 – 22, 1925, 18 L. Ed. 2d 1019, 1021, 1025 (1967), the Court held that the defendant's right to compulsory process was violated by excluding the co-defendant's testimony with respect to the circumstances of the shooting, when such testimony was "vital" to the defense's theory as to who fired the fatal shot. In *Chambers v. Mississippi*, 410 U.S. at 294 – 303, 93 S. Ct. at 1045 – 49, 35 L. Ed. 2d at 308 – 313, the Court held that the defendant's rights to confrontation and compulsory process were violated by the preclusion of cross-examination and the exclusion of direct testimony regarding a third-party's oral and written confessions to the charged-murder, finding that such evidence was "critical" to the defendant's defense of third-party guilt.

As stated, when viewed in context, *Scheffer* appears to support the ruling of the New Jersey Supreme Court. Unlike the evidence in *Scheffer*, the proffered evidence regarding J.S.'s prior sexual conduct was reliable, its admission would have preserved the core fact-finders core function of making credibility determinations, and its admission directly impacted on the issue of guilt or innocence. Under *Scheffer's* reasoning, the evidence in the case at bar would have been admissible.

Additionally, the cases discussed and rejected in *Scheffer* – namely, *Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi* – are squarely on point here. As in those cases, the New Jersey Supreme Court found that the admission of the proffered evidence was "critical to the ultimate determination of the jury," "was necessary for defendant to receive a fair trial," "was relevant and necessary for a fair determination of the witnesses' relative credibility and on the ultimate issue of consent." Pet., App. at 25a, 27a, 30a. The New Jersey Supreme Court concluded that the "exclusion of the

evidence was 'clearly capable of producing an unjust result.' " Therefore, there can be no question that the New Jersey Supreme Court found the exclusion of the evidence to have infringed upon a weighty interest of the accused.

Similarly, the New Jersey Supreme Court expressly relied upon *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Davis*, the State's key witness was a juvenile, who was serving a probationary term for a juvenile adjudication at the time he cooperated with the State and provided information that defendant was involved in a burglary. When the juvenile took the stand, the defense sought to cross-examine him regarding his bias, contending that due to his probationary status the juvenile had an incentive to curry favor with the State. The trial court precluded the cross-examination on the basis of the provisions protecting the juvenile's interests in the confidentiality of his juvenile adjudication. This Court reversed the conviction and held that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356.

Again, the New Jersey Supreme Court's decision is in complete accord with *Davis v. Alaska*. *See also Olden v. Kentucky*, 488 U.S. 227, 229 – 33, 109 S. Ct. 480, 482 – 84, 102 L. Ed. 2d 513, 518 – 20 (1988) (holding that the right to confront witnesses was violated by precluding cross-examination regarding the rape victim's cohabitation with defendant's half-brother, as such evidence was "crucial" to consent defense); *Crane v. Kentucky*, 476 U.S. at 690, 106 S. Ct. at 2146, 90 L. Ed. 2d at 645 (holding that the admission of testimony "central" to the defense regarding the reliability of the juvenile's murder confession was necessary for a fair trial).

Petitioner's misplaced reliance upon the *Scheffer* case reveals the fundamental flaw in the entirety of Petitioner's arguments. Petitioner draws attenuated analogies to issues

unrelated to the issue addressed by the Supreme Court of New Jersey and then draws sweeping conclusions based upon the analogies. For example, Petitioner attempts to analogize Respondent's right to present crucial evidence, evidence necessary for a fair determination of the ultimate issue of consent, to the admission of a conviction more than ten years old for impeachment purposes. *See* Pet. at 23 – 24. Clearly, the comparison is flawed. There is a tremendous difference between evidence truly essential to the ultimate issue in the case, namely consent, and rote and remote impeachment evidence.

Moreover, Petitioner refers to, and discusses at length, articles and studies on rape and reporting rates in the United States, when no one disputes the seriousness of the crime and when no one disputes that rape victim's have a legitimate interest in Rape Shield Laws. At certain points, Petitioner's submission constitutes nothing more than victim's rights propaganda. At others, Petitioner fails to recognize that there must be a balance between the interests of victims and the fundamental, constitutionally guaranteed rights of defendants. When tension arises that threatens to undermine the fairness of the criminal trial process and call into question the resulting verdict, then defendant's constitutional right to confront witnesses, to compulsory process, to a fair trial and so on should prevail.

III. THE NEW JERSEY SUPREME COURT'S DECISION DOES NOT HAVE ANY FAR-REACHING IMPLICATIONS.

In its petition, Petitioner argues that the New Jersey Supreme Court's ruling "is emblematic of a national phenomenon demanding the global action only this Court can take. Time and time again, we have seen a weakening of state rape shield laws. . . ." Pet. at 7. Further, Petitioner argues that the ruling will "cast doubt on the evidence rules of the federal government and a number of states." Pet. at 24 – 25. Without doubt, Petitioner greatly overstates the significance of the New Jersey Supreme Court's ruling.

A. THE NEW JERSEY SUPREME COURT DID NOT STRIKE DOWN THE RAPE SHIELD LAW.

The New Jersey Supreme Court did not strike down the New Jersey Rape Shield Statute. Rather, in reality, the New Jersey Supreme Court simply reaffirmed the *Budis* two-step analysis to determining when to admit evidence pertaining to a victim's past sexual conduct, an analysis employed by the New Jersey Courts for years. *See* Cannel, *New Jersey Crimes Code Annotated*, comment 4 on N.J. Stat. Ann. 2C:14 – 7d (stating that the "1994 changes in the statute can have no effect on that rule since it is required to preserve the statute from constitutional attack"). As such, contrary to the assertions in the petition, nothing has changed. The effect of the Court's ruling in New Jersey will be minimal. The effect of the Court's ruling elsewhere will be non-existent.

The New Jersey Supreme Court rightly recognized the important, diametrically opposed competing interests and struck a balance that served such interests:

> At stake in our evaluation of N.J. Stat. Ann. 2C:14 – 7 are competing rights: the right of a person accused of a crime to confront his accuser and to present evidence in support of his defense, and the right of a victim to maintain her privacy from unwarranted intrusions into her past. In balancing these competing claims, we must look to the nature and quality of the evidence offered and the need for that evidence to assure a fair determination of the issues.
>
> . . .
>
> On the one hand, the Shield Statute is intended to encourage the reporting of sexual abuse by assuring victims that they will not be subject to untoward invasions of privacy through excessive and collateral cross-examination of their prior sexual conduct. That objective also recognizes that jury verdicts

> should not be based on prejudicial excursions into the non-probative private affairs of a victim. On the other hand, the Statute preserves the core values that are protected by the Federal and State Confrontation Clauses – the right of the accused to present all relevant evidence necessary for the defense and the right to a fair trial. The privacy interest of the victim must be measured against preserving the integrity of the fact-finding process, the objective of which is to achieve a just verdict.

Pet., App. at 16a. The reformulation of the statute correctly balanced those interests.

B. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH ANY OTHER STATE OR FEDERAL DECISION.

As stated, Petitioner has asserted that the New Jersey Supreme Court's ruling will have far-reaching ramifications in state and federal jurisprudence. However, Petitioner fails to cite any reported decision that conflicts with the ruling. Petitioner further fails to note that New Jersey still maintains one of the strongest Rape Shield Laws in the country. Pet., App. at 36a – 37a. Accordingly, it appears that the ruling's has little potential for casting doubt on the evidence rules of the states or the federal government.

C. THE NEW JERSEY SUPREME COURT'S DECISION CANNOT BE CHARACTERIZED AS FAR-REACHING EVEN IN THE STATE OF NEW JERSEY.

As the New Jersey Supreme Court noted, its ruling cannot be characterized as far-reaching even in the State of New Jersey.

> *The case before us is limited to its unique facts.* We do not suggest that in other contexts personal interactions such as a compliment, a hug, or even an

> occasional off-color comment or joke, should be viewed as anything other than ordinary socializing. The circumstances of each case will determine whether the conduct has bearing on the issue of consent.

Pet., App. at 28a [emphasis added].

In sum, the New Jersey Supreme Court's ruling is a narrow ruling, in which the state court of last resort ruled upon the application of a state statute. Further, the Court basically reaffirmed the existing rule of law under *State v. Budis*, *supra.* and reformulated the statute in accordance with the state and federal constitutional principles cited therein. Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments, Respondent Anderson Garron respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

JOSEPH A. LEVIN
LEVANT, MARTIN & LEVIN, P.C.
Attorneys for Respondent
3201 Atlantic Avenue
Atlantic City, NJ 08401
(609) 345-9005